Sticks and Stones: Homosexual Solicitations and the Fighting Words Doctrine

The Ohio Supreme Court's decision in *State v. Phipps*,[1] upholding Ohio's same-sex solicitation statute, Ohio Revised Code section 2907.07(B),[2] exemplifies the dangers of creating exceptions to the first amendment[3] protection of speech. The majority of the court there demonstrated, by its inartful perversion of the fighting words doctrine, that such exceptions can open the door to government abuse, discrimination, and censorship, and that the court cannot be relied upon to protect the first amendment rights of those who are the objects of both the legislature's and the courts' ignorance and prejudice.

In order to cure the overbreadth of the Ohio importuning statute, the court attempted to construe it to apply only to fighting words,[4] one of the few types of speech excepted from first amendment protection. The court also found that the statute is not unconstitutionally vague.[5]

This Case Comment will analyze the Ohio Supreme Court's application of the fighting words doctrine in the *Phipps* case. To provide background for this discussion, a brief explication of the constitutional doctrines of vagueness and overbreadth will be included. Finally, it will be argued that the fighting words doctrine is inapplicable to homosexual solicitation.

I. The Facts and Holding of Phipps

At 2:15 A.M. on October 27, 1976, Kenneth Phipps stopped his car next to the curb of a street corner in downtown Cincinnati.[6] He rolled down his car window and motioned for the only person in the immediate vicinity to approach him.[7] When that person, an adult male police officer in civilian dress,[8] complied, Phipps said, "Hop in, let's go have sex."[9] The officer appeared hesitant after looking into the back seat of the car, which prompted Phipps to say, "You look paranoid, come on in, I want to suck

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1. 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979).

2. Ohio Rev. Code Ann. § 2907.07(B) (Page 1975). The statute provides: "No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard."

3. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The first amendment is applicable to the states through the fourteenth amendment. It provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

4. 58 Ohio St. 2d at 278, 389 N.E.2d at 1133.

5. *Id.* at 273, 389 N.E.2d at 1130.

6. *Id.* at 271, 389 N.E.2d at 1130.

7. Record at 8.

8. Record at 10. The officer was assigned to the Vice Department of the Cincinnati Police Department and was on duty at the time of the arrest. *Id.* at 7. The officer testified that he was offended. *Id.* at 9.

your dick."[10] At that point, the officer entered the vehicle[11] and Phipps made the same or a similar proposal.[12] He also told the officer that he was "handsome," "beautiful," and that he "really liked" him.[13] The officer then identified himself and placed Phipps under arrest.[14]

Based upon the preceding facts, Phipps was convicted by the Hamilton County Municipal Court[15] of importuning in violation of Ohio Revised Code section 2907.07(B). His conviction on appeal was reversed. The Hamilton County Court of Appeals held that the importuning statute was overbroad, thus restricting speech protected by the first amendment.[16] The court of appeals found the statute overbroad for two reasons: first, it did not proscribe speech that is unprotected by the first amendment; and second, it did proscribe protected speech in the absence of a compelling state interest for doing so.[17]

The court of appeals, in its search for a compelling state interest that would justify the creation of a new category of unprotected speech, considered two possibilities: an interest in prevention of homosexual activity, and an interest in prevention of offensive language.[18] It held that because Ohio law does not prohibit homosexual acts in private between consenting adults, "reason and consistency say that [consenting adults regardless of sexual preference] should be allowed to communicate with each other in order to determine whether or not both consent."[19] The court of appeals stated that "[o]ffensive language alone, however discordant with widely accepted values, is not subject to governmental regulation."[20] It also found no constitutional precedent holding that discussion of sexual matters is subject to greater government regulation than other types of speech.[21]

The court of appeals also found the statute to be unconstitutionally vague because it fails to give adequate notice of the conduct proscribed.[22] The court stated that the statute as written is vague because it makes a solicitation criminal based on the addressee's reaction[23] and because the

9. 58 Ohio St. 2d at 271, 389 N.E.2d at 1130.

10. *Id.*

11. *Id.*

12. *Id.*

13. Record at 10-11.

14. 58 Ohio St. 2d at 271, 389 N.E.2d at 1130.

15. *Id.*

16. State v. Phipps, No. C-76886 at 3 (Hamilton County Ct. App. March 28, 1978).

17. *Id.* at 6.

18. *Id.* at 5.

19. *Id.*

20. *Id.*, *quoting* Cohen v. California, 403 U.S. 15, 22 (1971).

21. State v. Phipps, No. C-76886 at 6 (Hamilton County Ct. App. March 28, 1978).

22. *Id.* at 8. *But see* the dissent by Judge Palmer, in which he finds that the statute affords adequate notice, *id.* at 11-16. Judge Palmer also found that the statute proscribed conduct and not speech, *id.* at 16-24, and that the state's interest in regulating such conduct was to protect the *addressee's* right of privacy, *id.* at 24-27.

23. *Id.* at 7-8.

test for offensiveness is not limited to a reasonable person standard. Even if a reasonable person standard were applied, the court observed, "the diversity and unpredictability of human sexual responses are such that the probability of accurate preduction about the offensiveness of homosexual advances is too uncertain to provide a firm foundation for a standard of criminal conduct."[24] In addition the court specifically held that Phipps' language was not fighting words.[25]

The Ohio Supreme Court reversed.[26] Relying on dictionary and statutory definitions of the operative words,[27] the court found Ohio Revised Code section 2907.07(B) "clearly and precisely written" and therefore not void for vagueness.[28]

The court did find the statute to be unconstitutionally overbroad.[29] In reaching this determination, it rejected the state's argument that the statute regulates conduct rather than speech.[30] It found, however, no state interest sufficiently compelling to allow regulation of homosexual solicitations. These solicitations, the court observed, do not represent "a substantial evil that arises far above public inconvenience, annoyance and unrest."[31] The court also detected no privacy interest sufficient to uphold the statute, noting that "the special plight of the captive audience is not involved."[32]

Unable to find a compelling reason to uphold the statute,[33] the court determined that it could not allow the statute to stand unless it prohibited only constitutionally unprotected speech.[34] The court, therefore, construed Ohio Revised Code section 2907.07(B) narrowly to make it applicable only to fighting words.[35] As will be shown below, the court did considerable damage to the first amendment in reaching this result.

In a well-reasoned dissent, Justice Sweeney agreed that the statute is

24. *Id.* at 8.

25. *Id.* at 4.

26. 58 Ohio St. 2d at 280, 389 N.E.2d at 1134.

27. *Id.* at 273-275, 389 N.E.2d at 1130-31.

28. *Id.* at 274, 389 N.E.2d at 1131.

29. *Id.* at 278, 389 N.E.2d at 1133.

30. *Id.* at 276, 389 N.E.2d at 1132. In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the United States Supreme Court indicated that a less rigorous overbreadth test would be used in analyzing statutes primarily affecting conduct. One commentator has noted, however, that this merely suggests "that expressive conduct falls outside the protection of the first amendment more frequently than does speech; it does not indicate essential differences between speech and constitutionally protected conduct." *See* Note, *First Amendment Vagueness and Overbreadth: Theoretical Revisions by the Burger Court*, 31 VAND. L.R. 609, 614-15 (1978) [hereinafter cited as *Vagueness and Overbreadth*]. This being true, the court's finding that the statute regulated speech and not conduct should have no significant impact on the outcome of the case. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-7 at 598-601 (1978).

31. 58 Ohio St. 2d at 277, 389 N.E.2d at 1133. It is necessary to show that there is a compelling state interest in the regulation of speech in order for the regulation to be lawful, unless the speech falls into one of the categories excepted from first amendment protection. L. TRIBE *supra* note 30, § 12-8 at 602.

32. 58 Ohio St. 2d at 277-78, 389 N.E.2d at 1133, *quoting* Cohen v. California, 403 U.S. at 21-22.

33. 58 Ohio St. 2d at 278, 389 N.E.2d at 1133.

34. *Id.*

35. *Id.*

36. *Id.* at 280, 389 N.E.2d at 1134.

overbroad.[36] He found, however, that the majority's attempt to narrow it to apply only to fighting words was really "a vehicle for salvaging constitutionally deficient legislation."[37] Justice Sweeney observed that the majority had failed to recognize the "long-standing distinction between fighting words and merely offensive speech" in its attempt to fit sexual solicitations into the definition of fighting words.[38] He would have affirmed the court of appeals decision.[39]

II. The Constitutional Doctrines Applied in Phipps

In reaching its decision in *Phipps*, the Ohio Supreme Court considered challenges to Ohio Revised Code section 2907.07(B) based on three constitutional doctrines: vagueness, overbreadth and fighting words. Although the focus of this Case Comment is the fighting words doctrine as applied in *Phipps*, a brief description of the vagueness and overbreadth doctrines follows to provide a foundation for the subsequent discussion of their application in *Phipps*. A detailed analysis of the fighting words doctrine is then presented. It will develop the historical background of the doctrine and analyze the changes it has undergone to the present day.

A. *Vagueness and Overbreadth Doctrines*

The vagueness and overbreadth doctrines have traditionally been viewed as similar, if not identical, and originally were treated as equivalent in their applications to first amendment cases.[40] As time has passed the distinctions between the two doctrines have become more defined; yet there is still significant interplay between them.[41] A statute is overbroad when it prohibits constitutionally protected activity while attempting to regulate unprotected activity.[42] A statute is void for vagueness when it fails to give adequate notice of the prohibited activity, thus depriving those subject to the statute of their right to procedural due process.[43] Statutes that are vague and/or overbroad are subject to stringent constitutional analysis because of their potential application to protected conduct, and because they may inhibit constitutionally protected activity. This is often referred to as the "chilling" effect.[44] For this reason, the existence of the statute is as harmful as its enforcement. In addition, statutes found to be vague or overbroad are disfavored because they leave too much to the discretion of the police and the judiciary.[45] Due to these considerations

37. *Id.* at 281, 389 N.E.2d at 1135.

38. *Id.* at 280, 389 N.E.2d at 1135.

39. *Id.* at 281, 389 N.E.2d at 1135.

40. *See generally Vagueness and Overbreadth, supra* note 30, at 609.

41. L. Tribe, *supra* note 30, § 12-26 at 716; J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law at 722 (1978); *Vagueness and Overbreadth, supra* note 30, at 611.

42. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

43. Conally v. General Constr. Co., 269 U.S. 385, 391 (1926).

44. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104, 109 (1972).

45. *Id.* at 108-09.

underlying first amendment protection, a litigant may challenge a statute as vague or overbroad as it is applied to his own conduct or as overbroad regardless of its application of his particular activity.[46]

1. *Vagueness Doctrine*

The generally accepted formulation of the vagueness doctrine is derived from *Connolly v. General Construction Co.*,[47] in which the United States Supreme Court stated that a statute is void for vagueness if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[48] A vague statute is subject to several possible infirmities. It may give inadequate notice of proscribed conduct,[49] or it may provide insufficient guidelines for enforcement,[50] or it may result in a "chilling" of first amendment rights.[51] While the "chilling" effect is frequently the basis of challenges involving first amendment rights, inadequate notice or insufficient guidelines for enforcement may be applicable in such cases.[52]

It may be impossible to draft a statute without some element of vagueness, and no requirement of absolute clarity has ever been imposed upon legislators.[53] Yet in cases involving first amendment rights a greater degree of facial clarity is required.[54] This stricter standard of clarity is required not only because of potential infringement of the right of notice and the right to be free from arbitrary and discriminatory enforcement of the laws, but also because of the high value placed on freedom of speech.[55]

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46. *See Vagueness and Overbreadth, supra* note 30, at 610-11.

47. 269 U.S. 385 (1926).

48. *Id.* at 391.

49. *Id.*

50. Smith v. Goguen, 415 U.S. 566, 572-73 (1974); Grayned v. Rockford, 408 U.S. at 108-09.

51. *See* text accompanying note 44 *supra*. *See also* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-76 (1960) [hereinafter cited as *Void-For-Vagueness Doctrine*]; Note, *Disorderly Conduct and Loitering—A Modern Approach to Traditional Legislation*, 30 ARK. L. REV. 186, 205-07 (1976) [hereinafter cited as *Disorderly Conduct*]; *Vagueness and Overbreadth, supra* note 30, at 610.

52. *Disorderly Conduct, supra* note 52, at 199-202. L. TRIBE, *supra* note 30, § 12-28 at 619 notes that chilling effect can result from inadequate notice or insufficient guidelines for enforcement; but it can also result from notice that is overly sufficient.

53. The difficulty of legislative drafting often has been recognized by the Court. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 159-60 (1974). *See also Vagueness and Overbreadth, supra* note 30, at 626-27.

54. Smith v. Goguen, 415 U.S. at 573. The formulation for the degree of facial clarity has never firmly been established; it is necessary, however, that a statute be drawn as narrowly as practicable. Those standards that have been set forth provide "only limited guidance and may be manipulated considerably." *Vagueness and Overbreadth, supra* note 30, at 627. *See also* L. TRIBE, *supra* note 30, § 12-28 at 719.

55. Because of the high value placed on free speech, the courts had allowed third party claims to be used as the basis for a vagueness challenge where speech was involved. *E.g.*, Winters v. New York, 333 U.S. 507, 509 (1948). In such instances a vagueness challenge could successfully be asserted without regard to its applicability to the litigant's specific conduct. More recently, however, the requirements for a successful challenge on the basis of vagueness have been modified. Now it must be shown that the challenged statute is vague in its application to the challenger's conduct. Parker v. Levy, 417 U.S. 733, 756 (1974); Smith v. Goguen, 415 U.S. 566, 578 (1974). In order to have standing to raise the issue of vagueness, the challenging party must allege that the statute is vague as applied to everyone, including

2. *Overbreadth Doctrine*

A statute is overbroad when it proscribes constitutionally protected activity in its attempt to prohibit unprotected acts.[56] Although many laws have some potential applicability to constitutionally protected conduct,[57] this alone is not sufficient to invalidate their enforcement except as applied to protected activity.[58]

A statute that has as its general focus the regulation of conduct that, merely by circumstance and without marked regularity, includes speech will not be struck down as overbroad simply because it occasionally may be applied to protected first amendment activity. Such a law can remain in effect while unconstitutional applications are determined on a case-by-case basis.[59] If a statute significantly infringes protected first amendment activity, however, the potential chilling effect is deemed too great a risk to allow the slow process of case-by-case determination to establish the proper scope of the statute.[60] Thus, when first amendment rights are involved, an overbroad statute is void until it is rewritten or narrowly construed to avoid infringement of protected speech.[61]

B. *Fighting Words Doctrine*

The first amendment guarantees freedom from government censorship of speech.[62] Although the language of the amendment seems to make this protection absolute, certain categories of speech have been recognized as being beyond its shelter.[63] The fighting words doctrine is one of those exceptions. As originally defined by the United States Supreme Court in *Chaplinsky v. New Hampshire*,[64] fighting words were those words

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him, or he may allege that although the statute may be constitutionally applicable to some conduct, it is not so applicable in respect to the facts of his particular case. L. TRIBE, *supra* note 30, § 12-29 at 720-21; *Vagueness and Overbreadth, supra* note 30, at 629-35.

56. For an example of a statute that has been found overbroad, *see* Thornhill v. Alabama, 310 U.S. 88, 91-92 (1940). *See* L. TRIBE, *supra* note 30, § 12-24 at 710-12, § 12-25 at 712-14, for a discussion of the characteristics of overbroad statutes.

57. Marsh v. Alabama, 326 U.S. 501 (1946) (Jehovah's Witnesses were allowed to distribute religious literature on the streets of a company town despite an otherwise enforceable trespass statute). *See also* NAACP v. Button, 371 U.S. 415 (1963).

58. Marsh v. Alabama, 326 U.S. at 509.

59. Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973). (A statute's overbreadth may be "cured through case-by-case analysis.")

60. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). Moreover, the Court noted that "[t]he chilling effect upon the exercise of first amendment rights may derive from *the fact of the prosecution*, unaffected by the prospect of its success or failure." *Id.* at 487 (emphasis added).

61. Gooding v. Wilson, 405 U.S. 518, 522 (1972).

62. *See* note 3 *supra.*

63. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

64. 315 U.S. 568 (1942). The forerunner of the fighting words doctrine is Cantwell v. Connecticut, 310 U.S. 296 (1940). In that case, Cantwell, a Jehovah's Witness, was soliciting funds for his church. As a part of the solicitation he played a recording that contained an attack on organized religion, particularly the Catholic Church. Cantwell played this recording for two Catholic men who were "highly offended." Cantwell was charged with the common law offense of breach of the peace. On appeal, the United States Supreme Court reversed Cantwell's conviction, noting that one might be

"which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[65]

In *Chaplinsky*, the defendant, a Jehovah's Witness, had been preaching in the streets. When a disturbance arose Chaplinsky was escorted to the police station by an officer.[66] On the way they met another officer, to whom Chaplinsky said " 'You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.' "[67] Chaplinsky was convicted under a statute proscribing "offensive, derisive or annoying" language in public.[68] On appeal from that conviction the United States Supreme Court held that the statute had been brought within constitutional guidelines by the narrowing construction given it by the New Hampshire courts, which had declared that it applies only when the language has a direct tendency to cause acts of violence by the persons to whom it is addressed.[69] Although the construction of the New Hampshire courts clearly was limited to preventing a breach of the peace,[70] the United States Supreme Court gave a much broader scope to the fighting words exception to the first amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"—those which by their very

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guilty of a breach of the peace "if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended." *Id.* at 309. The Court found "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse," *id.* at 310, and no breach of the peace. This case, however, did not present a pure speech issue because Cantwell's conduct was in the furtherance of his religious beliefs. The Court's decision therefore balanced not only the speech interest but also that of religious freedom against the state's interest in preserving the peace. *Id.* at 307. Also, the case did not present a pure fighting words issue since the offensive language was not part of a face-to-face confrontation and the listeners had given their consent to hear the recording.

65. 315 U.S. at 569.

66. *Id.* at 570. It is unclear whether Chaplinsky was under arrest at that time.

67. Id. at 569. Chaplinsky stated that his remark was in response to a curse by the officer. The trial court, however, found that neither provocation nor the truth of the remarks were a defense. *Id.* at 570.

68. *Id.* at 569.

69. Id. at 573. The state's construction is as follows:

> "The word 'offensive' is not to be defined in terms of what a particular addressee thinks . . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile . . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revelings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace . . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." (footnote omitted).

Quoted at 315 U.S. at 573.

70. 315 U.S. at 573.

> utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[71]

The court adopted this expansive definition of fighting words from Professor Zechariah Chafee's *Free Speech in the United States*.[72] The state had limited its definition to include only those words "plainly tending to excite the addressee to a breach of the peace,"[73] but the United States Supreme Court's definition included words that cause injury by their mere utterance. Despite this broadened definition, the statute as construed and the facts of the case were concerned only with words likely to cause a breach of the peace.

From the *Chaplinsky* definition of fighting words, three factors can be identified as underlying the fighting words doctrine: (1) the behavioral assumption that words can trigger the average person to react with immediate violence, (2) the value of speech determines in part the level of constitutional protection it deserves, and (3) the state interests in preserving the peace and protecting citizens' sensibilities warrant the prohibition of speech in some circumstances.[74] The following sections will examine how the Court's evaluation of these factors has changed since *Chaplinsky* so as to narrow the fighting words exception.

1. *The Behavioral Assumption of the Fighting Words Doctrine*

The court in *Chaplinsky* accepted as one form of fighting words[75] those that "tend to incite an immediate breach of the peace."[76] This definition implies that there is an unavoidable relationship between the utterance of certain offensive words in a face-to-face confrontation and a violent response on the part of the addressee. The acceptance of this behavioral theory allows the Court to avoid consideration of whether the anticipated breach of the peace could be avoided by further communication. Otherwise, the government would have to prove that the prohibition of "fighting words" prevented a harm that could not be stopped by a further exchange of ideas.[77] This behavioral assumption also assumes that there is no less restrictive means available to the state for preventing the

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71. *Id.* at 571-72 (footnotes omitted).

72. Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES (1941).

73. *See* note 69 *supra*.

74. *See generally* Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. CIV. R.L. REV. 1, 5-9 (1974) [hereinafter cited as *Offensive Language*].

75. The other form being words that "by their very utterance inflict injury." 315 U.S. at 572.

76. *Id.*

77. Whenever a further exchange of ideas can avoid an expected harm, the government cannot justify the prohibition of the speech since prohibition would not be the least restrictive means of protecting the state's interest. L. TRIBE, *supra* note 30, § 12-8 at 602-03.

violent response."[78] Clearly, this behavioral assumption allows the proscription of certain speech with minimal justification by the government. The behavioral assumption doctrine has undergone little change since *Chaplinsky*. The fighting words "uncontrollable impulse" theory has never been applied by the United States Supreme Court unless the case involved an individual face-to-face confrontation. In *Terminiello v. Chicago*[79] the Court addressed the issue of speech that causes violent reactions when addressed to a crowd. The Court never reached the question whether such speech constitutes fighting words under the uncontrollable impulse theory.[80] Instead it stated that speech to an audience is protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[81] In *Cohen v. California*[82] the words "Fuck the Draft," worn on a jacket, were found not to be fighting words because they were not directed to any particular individual.[83] The Court also found that Cohen's "speech" could not be prohibited because of the state's fear that violence would result, in the absence of evidence that such a result was likely.[84] In *Hess v. Indiana*,[85] offensive language not personally directed to an individual was also held not to be fighting words. Personal affront thus continues to be a requirement before the behavioral assumption doctrine applied.

The uncontrollable impulse theory of behavior remains at the heart of the fighting words doctrine.[86] The Court has consistently held that the fighting words exception to first amendment protection must be narrowly construed,[87] yet it has not required proof that the words led to a violent reaction. Although in *Chaplinsky* the Court established that the behavioral assumption of an uncontrollable impulse was to be based on the likely reaction of an average addressee,[88] it has not as yet called for evidence of what would be an average response. This absence of any

78. *Offensive Language, supra* note 74, at 9.

79. 337 U.S. 1 (1949). A suspended Catholic priest made a race-baiting speech that resulted in protests and violence from the crowd.

80. *Id.* at 3.

81. *Id.* at 4.

82. 403 U.S. 15 (1971).

83. *Id.* at 20.

84. *Id.* at 23.

85. 414 U.S. 105 (1973). With his back to a police officer, Hess said "[w]e'll take the fucking street later." *Id.* at 107.

86. Without this assumption there would be no reasonable basis for the proscription of speech. If the addressee could control his reaction and simply choose not to fight, then he, rather than the speaker, should be subject to criminal sanctions. The government can justify the proscription of speech only if there is no less restrictive means available of serving a legitimate government interest. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 41, at 727.

87. Chaplinsky v. New Hampshire, 315 U.S. at 571. The Court found fighting words to be one of the "well defined and narrowly limited classes of speech" exempt from constitutional protection. The cases discussed herein demonstrate that the Court has continued to construe fighting words narrowly.

88. *Id.* at 573. *See* note 69 *supra.*

requirement of proof concerning the average response allows the judiciary to take judicial notice of what constitutes fighting words, just as the Court did in *Chaplinsky*.[89] This is a serious flaw in the fighting words doctrine because, without evidence upon which to base its decision, the Court may find its own prejudices dictating what will be considered fighting words.[90]

2. *The Value of Speech and Application of Fighting Words Doctrine*

The Court in *Chaplinsky* said that only speech that communicates information ("idea speech") deserves constitutional protection. This reasoning followed that of Justice Holmes in a dissent written many years before which declared that "the ultimate good desired is better reached by free trade in ideas."[91] Offensive speech, such as fighting words, was found in *Chaplinsky* not to be "in any proper sense communication of information or opinion safeguarded by the Constitution."[92] Once the Court had determined that fighting words had little or no value, it had little difficulty in allowing their proscription.

Several years later the Court began to erode the *Chaplinsky* concept that the first amendment protects only the "idea speech." In *Winters v. New York*[93] the Court found that magazines containing "nothing of any possible value to society" nevertheless are entitled to constitutional protection.[94] It noted that "[w]hat is one man's amusement, teaches another's doctrine."[95] The Court thus added the entertainment value of speech as a rationale for first amendment protection. Libel in the form of good faith intentional criticism of government officials is no longer outside first amendment protection following the decision in *New York Times v. Sullivan*.[96] This is a significant expansion of the *Chaplinsky* concept of protected speech since it recognizes that even an untruth can have sufficient value to merit constitutional protection. In *Virginia State Board of Pharmacy v. Virginia Consumer Council*,[97] commercial speech gained the shelter of first amendment protection.[98]

The emotive value of speech was acknowledged in *Cohen v. California*.[99] Addressing the issue of the state's right to prohibit speech in

89. 315 U.S. at 574. The Court stated: "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breech of the peace." *See also* Cohen v. California, 403 U.S. at 20.

90. *See* text accompanying note 72 *supra*.

91. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

92. 315 U.S. at 572.

93. 333 U.S. 507 (1948).

94. *Id.* at 510. The Court refused to find "that the constitutional protection for a free press applies only to the exposition of ideas." *Id.*

95. *Id.*

96. 376 U.S. 254 (1964).

97. 425 U.S. 748 (1976).

98. The protection, however, is not absolute. 425 U.S. at 770-73.

99. 403 U.S. 15 (1971).

order that a palatable level of discourse be maintained, the Court stated that "words are often chosen as much for their emotive as their cognitive force."[100] Thus, any misconception that constitutional protection does not extend to the emotive function of speech "which, practically speaking, may often be the more important element of the overall message sought to be communicated,"[101] was laid to rest.

This post-*Chaplinsky* expansion of the types of speech that are constitutionally protected means that courts must now examine the circumstances surrounding the use of language. This is a marked difference in approach from the *Chaplinsky* court, which recognized a static class of near zero value speech that could always be fighting words.[102] In *Cohen* the Court acknowledged that the four-letter word displayed on Cohen's jacket could easily be used as a fighting word[103] but said that when it is used to convey a political message and/or is not directed to an individual as a personally abusive epithet, it is not a fighting word.[104] The circumstances of a word's use determine its value and therefore the level of constitutional protection its user will receive. In *Hess*[105] the Court stated, in reference to the same four-letter word used in *Cohen*, that even if under other circumstances the speech could be regarded as fighting words, it could not be so considered when it had not been directed to anyone in particular. The one circumstance that consistently has been required for fighting words is that they be personally abusive epithets addressed to an individual. *Chaplinsky*, which involved a face-to-face confrontation replete with name-calling, is the only fighting words conviction that has been upheld by the United States Supreme Court.[106] Other cases in which fighting words convictions have not been upheld often cite the lack of a personally insulting confrontation as the reason.[107]

The expanded concept of the value of speech that has developed in the thirty-eight years since *Chaplinsky*, combined with the requirement that the circumstances surrounding the use of the language in question be considered before a value is placed on the speech, make it clear that the fighting words doctrine is to be used cautiously and applied narrowly.[108] Speech is held to fall outside first amendment protection as fighting words only when it is used in a personally abusive manner in a face-to-face confrontation between individuals. This narrowed applicability of the

100. *Id.* at 26.

101. *Id.*

102. 315 U.S. at 572, 573. In *Chaplinsky* the Court observed that, "[t]he English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile." *Id.* at 573.

103. 403 U.S. at 20.

104. *Id.* at 18-20.

105. 414 U.S. 105, 107 (1973).

106. 315 U.S. 15 (1941).

107. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973).

108. This policy is set forth in Gooding v. Wilson, 405 U.S. 518, 522 (1972).

fighting words doctrine is appropriate in light of the constitutional mandate against the infringement of free speech.[109]

3. *State Interests That Justify the Fighting Words Doctrine*

The definition of fighting words in *Chaplinsky* identifies two potential harms that serve as justification for the proscription of such speech: first, injury to the sensibilities; and second, the threat of an immediate breach of the peace.[110] The identification of these two harms anticipates two possible reactions by the addressees of the fighting words.[111]

a. *The Sensibilities Interest*

The state's interest in preventing injury to the sensibilities of citizens is based on the idea that people have a right to internal emotional order,[112] analogous to the right not to be assaulted physically. The state's interest in protecting sensibilities should arise only in situations in which further speech is unlikely to repair the harm.[113] Although the interest in protecting sensibilities was included in the *Chaplinsky* definition of fighting words, the facts of the case and the Court's decision did not rely on this interest.[114]

Attempting to protect people's sensibilities through the machinery of law presents difficult problems of proof. Emotional upset may not be visible even at the time it occurs. Providing evidence of injury often would be nearly impossible. With no outward measure of harm, enforcement of a law to protect sensibilities must rely heavily on the testimony of the injured party. The potential for abuse in the form of malicious prosecution or on the basis of simple differences in the degree of each person's sensitivities is

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109. *See* note 3 *supra.*

110. 315 U.S. at 572.

111. The Court cited Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149 (1941) as the source for the fighting words definition. Chafee provided a general discussion of offensive speech. He did not draw clear lines between obscenity, profanity and gross libels, nor did he mention a separate class of language known as fighting words. Rather, he considered "insults . . . . liable to provoke a fight" one example of obscenity, profanity and/or gross libel. *Id.* at 150. He considered all such language to be of the same ilk and subject to the same proscription. Chafee warned against creating new categories of verbal crimes. He observed the difficulty of establishing clear tests for such crimes and stated that: "When the law supplies no definite standard of criminality, a judge . . . may consciously disregard the sound test of present injury, and . . . condemn the defendant because his words express ideas which are thought liable to cause bad future consequences." *Id.* Chafee concludes with the warning that, "all these crimes of injurious words must be kept within very narrow limits if they are not to give excessive opportunities for outlawing heterodox ideas." *Id.* at 152. It is unfortunate that Chafee's work should have been instrumental in the creation of a new exception to the first amendment protection of speech. It is even more unfortunate that the fighting words doctrine is subject to all the frailties that Chafee warned against.

112. *Offensive Language, supra* note 74, at 7.

113. *See* L. TRIBE, *supra* note 30, § 12-8 at 606.

114. 315 U.S. at 574.

clear.[115] In addition, the extreme difficulty of predicting what will offend another person's sensibilities presents serious notice problems.[116]

It was not until 1969, twenty-seven years after *Chaplinsky*, that the Court again addressed the sensibilities issue in *Street v. New York*.[117] Although the Court found that Street's speech did not constitute fighting words, it did recognize that the state had "an interest in protecting the sensibilities of passers-by who might be shocked"[118] by Street's words.

The Court declared, however, that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[119] This indicates that sensibilities can be protected only from the manner in which ideas are expressed and not from the ideas themselves.

In *Cohen v. California*[120] fighting words were defined as "those personally abusive epithets which, when addressed to the ordinary citizen are as a matter of common knowledge, inherently likely to provoke violent reaction."[121] The sensibilities interest was completely omitted from the discussion of the fighting words doctrine, despite a citation to *Chaplinsky*.[122] The Court also limited the validity of the sensibilities interest as a basis for the proscription of offensive speech. Only if substantial privacy interests are seriously invaded in a manner that does not allow the unwilling observer to turn away, the Court said, will offensive discourse be prohibited in order to protect sensibilities.[123]

In *Gooding v. Wilson*,[124] the Court's explanation of the fighting words doctrine impliedly rejected the sensibilities interest as a basis for the prohibition of speech. The Court rejected the *Chaplinsky* definition of fighting words and instead cited the New Hampshire court's definition,[125] which applied the doctrine only to prevent a breach of the peace. In *Gooding*, a Georgia statute that prohibited "opprobrious words or abusive language, tending to cause a breach of the peace,"[126] was found overbroad.[127] The prior decisions of Georgia courts[128] construing the

115. *See Offensive Language, supra* note 74, at 7.

116. For a discussion of lack of notice and vagueness doctrine, *see* text accompanying note 55 *supra*.

117. 394 U.S. 576 (1969).

118. *Id.* at 591. Street was burning an American flag in reaction to the shooting of a prominent civil rights leader. While he was burning the flag he said, "We don't need no damn flag." *Id.* at 576.

119. *Id.* at 592.

120. 403 U.S. 15 (1971).

121. *Id.* at 20.

122. *Id.*

123. *Id.* at 21.

124. 405 U.S. 518 (1972).

125. *Id.* at 523.

126. *Id.* at 519.

127. *Id.*

128. *Samuels v. State*, 103 Ga. App. 66, 118 S.E. 2d 231 (1961); *Lyons v. State*, 94 Ga. App. 570, 95 S.E.2d 478 (1956); *Elmore v. State*, 15 Ga. App. 461, 83 S.E. 799 (1914); *Jackson v. State*, 14 Ga. App. 19, 80 S.E. 20 (1913); *Fish v. State*, 124 Ga. 416, 52 S.E. 737 (1905).

statute had permitted the prohibition of speech that was merely harsh or insulting,[129] which clearly was not within the narrow limits of the fighting words doctrine. The Court referred to *Chaplinsky* a number of times, but throughout the opinion it relied only on the state's interest in keeping the peace to determine whether the Georgia statute was valid.[130] This created a strong implication that the sensibilities interest had been abandoned as a part of the fighting words doctrine.

Several months after *Gooding*, three more cases based on offensive language statutes came to the Court. These cases confirmed the implication in *Gooding* that an affront to sensibilities no longer qualified as fighting words.

In *Rosenfeld v. New Jersey*[131] the defendant used the term "motherfucker" in a speech given at a public school board meeting.[132] He was charged with disorderly conduct under a statute that had previously been interpreted to prohibit language "of such a nature as to be likely to incite the hearer to an immediate breach or to be likely . . . to affect the sensibilities of a hearer."[133] The majority vacated the conviction and remanded without opinion for reconsideration in light of *Gooding* and *Cohen*. Since New Jersey's prior interpretation of the statute was within the guidelines of the *Chaplinsky* definition of fighting words, the Court apparently remanded to eliminate the sensibilities aspect of the statute's prior construction.[134] In his dissent, Justice Powell argued that the interest in protecting sensibilities should remain part of the fighting words doctrine.[135]

In both *Lewis v. New Orleans*[136] and *Brown v. Oklahoma*,[137] broadly worded offensive language statutes were at issue.[138] Neither statute had been given a narrowing construction. *Lewis* was remanded for reconsideration in light of *Gooding*.[139] *Brown* was remanded for reappraisal in light of both *Gooding* and *Cohen*.[140] In both cases the language prohibited

129. 405 U.S. at 525.

130. *Id.* at 518, 522, 523, 524, 525, 528.

131. 408 U.S. 901 (1972).

132. *Id.* at 904.

133. *Id.*

134. On rehearing, the New Jersey Superior Court found the statute as previously construed to be overbroad. It found that the Court's remand was based on the inclusion of the sensibilities interest in the statute's interpretation. *State v. Rosenfeld*, 120 N.J. Super. 458, 459-460, 295 A.2d 1, 2 (App. Div. 1972).

135. 408 U.S. at 905. Justice Powell was joined in his dissent by Chief Justice Burger and Justice Blackmun. Justice Rehnquist, in a separate dissent, did not discuss the sensibilities interest specifically, although he felt that Rosenfeld's language should come within the *Chaplinsky* definition of fighting words. *Id.* at 911.

136. 408 U.S. 913 (1972).

137. 408 U.S. 914 (1972).

138. The statute in *Lewis* proscribed the use of "obscene or opprobrious language toward or with reference to any member of the city police." 408 U.S. at 910 (Rehnquist, J., dissenting). The statute in *Brown* prohibited "obscene or lascivious language." 408 U.S. at 911 (Rehnquist, J., dissenting).

139. 408 U.S. 913.

140. 408 U.S. 914.

was not restricted to speech likely to provoke a violent response by the addressee.[141] Since the Court's decision in *Gooding*, it consistently has followed the pattern it set in *Rosenfeld, Lewis*, and *Brown* of vacating and remanding cases involving offensive language statutes defined more broadly than the statute approved in *Chaplinsky*.[142]

The elimination of the state interest in protecting citizens' sensibilities as a basis for the prohibition of speech under the fighting words doctrine[143] indicates a more sensitive approach to the first amendment protection of speech than was originally formulated in *Chaplinsky*. This new approach eliminates the evidentiary problems associated with enforcement under the old definition.[144] More importantly, it demonstrates the Court's recognition that government regulation and interference in interpersonal communications is not a valid exercise of state police power.

b. *The Interest in Preserving the Peace*

The second interest recognized in the *Chaplinsky* concept of the fighting words doctrine is the prevention of breaches of the peace.[145] The state's interest in maintaining physical order is readily understandable.

The fighting words doctrine allows the proscription of speech that is likely to or has a tendency to cause a breach of the peace.[146] This permits the restraint of speech without any actual injury taking place. Because speech can be prohibited before any breach of the peace occurs, the decision that it has reached such a level that it has a tendency to cause a breach of the peace lies first with the addressee of the language. This judgment is then second-guessed by a police officer, who determines whether a law has been violated.[147] The final determination rests with the court. Each of these decisions is based on subjective judgments. Proof is extremely difficult. In some instances, an addressee may give a warning or threaten violent response,[148] but often there will be no evidence that a

141. *See* note 139 *supra*. On rehearing, the Louisiana Supreme Court upheld the conviction in *Lewis*, taking the position that the statute was narrow as written. New Orleans v. Lewis, 263 La. 809, 269 So. 2d 450 (1972). When the case reached the United States Supreme Court for the second time, the Court again reversed. This time it found the statute facially void because it was not limited to words likely to cause an immediate breach of the peace. 415 U.S. 130, 131 (1974). The conviction in *Brown* was reversed on remand. Brown v. State, 503 P.2d 571 (Okla. Crim. App. 1972).

142. It should be remembered that the statute approved in *Chaplinsky* dealt only with preventing breaches of the peace; it did not include any protection of the sensibilities interest. *See* note 70 *supra*. Cases remanded include Lucas v. Arkansas, 416 U.S. 919 (1974); Kelley v. Ohio, 416 U.S. 923 (1974); Rosen v. California, 416 U.S. 924 (1974); Karlan v. Cincinnati, 416 U.S. 924 (1974); Carson v. Columbus, 409 U.S. 1053 (1972).

143. The sensibilities interest has limited viability in cases in which other forms of expression are involved. *See* Erznoznik v. Jacksonville, 422 U.S. 205 (1975); Spence v. Washington, 418 U.S. 405 (1974).

144. *See* text accompanying notes 115 and 116 *supra*.

145. 315 U.S. at 572.

146. *Id.*

147. In cases in which the addressee is a police officer, as in *Phipps*, one level of determination is eliminated. This is the normal pattern in fighting words cases. With few exceptions, fighting words cases involve speech either directed to or perceived by police officers as in *Chaplinsky* and *Cohen*.

148. Cantwell v. Connecticut, 310 U.S. 296 (1940); Feiner v. New York, 340 U.S. 315 (1951).

breach of the peace was about to occur other than the judgment of the addressee. This opens the door to abuses ranging from false prosecutions to simple errors in judgment.

The most significant problem, however, is that a law based on a subjective standard for evaluating the speech of others can be misused as a tool for censoring ideas.[149] In circumstances in which some actual violence has occurred, problems of proof are only slightly simplified because it is still necessary to determine that an average person would have reacted in a like manner.[150]

When a statute applicable to fighting words is used as a means of preserving the peace, the Court requires that the definition of breach of the peace be narrow.[151] It cannot include protection of sensibilities, nor can it be so broad that protected speech is curtailed on any other rationale.[152]

In *Gooding*,[153] an additional requirement was imposed: not only must the words used be likely to elicit a violent response in an average addressee, but in the actual addressees as well.[154] Prior to *Gooding*,[155] lower courts had interpreted the fighting words rationale to apply even where the addressee was "locked in a prison cell or on the opposite bank of an impassable torrent."[156] In *Gooding* the Court held that this interpretation is incorrect.

The Court's requirement in *Gooding* that a violent reaction must have been a real possibility is not limited to the situation in which a physical barrier separates the speaker and the addressee. Since the state's interest in using the fighting words doctrine is to preserve the peace, its interest diminishes proportionately as the likelihood of a breach of the peace diminishes. The characteristics of the individual addressee thus become important. As pointed out by Justice Powell in his concurrence in *Lewis v. New Orleans*,[157] the fact that an addressee is a police officer is significant.

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149. It is significant that the majority of cases in which a fighting words challenge has reached the United States Supreme Court originated with speech involving religious or political matters. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973); Lewis v. New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969). The potential for censorship is even more clearly illustrated by cases in which a fighting words argument was spuriously advanced. In Edwards v. South Carolina, 372 U.S. 229 (1963), blacks were peacefully demonstrating for their civil rights. The Court found that "I am proud to be a Negro" and "Down with segregation" are not fighting words. *Id.* at 231, 236. In Brown v. Louisiana, 383 U.S. 131 (1966), the Court stated in a footnote that the fighting words doctrine does not apply to peaceful demonstrations. *Id.* at 564. *See also* Bachellar v. Maryland, 397 U.S. 564 (1970).

150. In *Chaplinsky*, the Court took judicial notice of how an average person would react. 315 U.S. at 573. The permissibility of this practice is highly questionable in view of the potential for abuse that it allows. Judges are human and just as likely to be prejudiced as other persons.

151. Gooding v. Wilson, 405 U.S. at 527. *See also* Ashton v. Kentucky, 384 U.S. 195 (1966); Cox v. Louisiana, 379 U.S. 536 (1965).

152. *See* text accompanying notes 115 and 116 *supra*.

153. 405 U.S. 518.

154. *Id.* at 528.

155. *Id.* at 525.

156. *Id.* at 525-26, *quoting* Elmore v. State, 15 Ga. App. 461, 83 S.E. 799 (1914).

157. 408 U.S. 913.

Even if an average person would be likely to fight in response to certain words in a particular situation, a police officer is "trained to exercise a higher degree of restraint."[158]

The state's valid interest in preventing breaches of the peace has long been recognized and upheld in the application of the fighting words doctrine. This interest must be weighed carefully, and the fighting words doctrine construed narrowly in order to avoid infringing first amendment rights. The Court's requirements that "breach of the peace" be narrowly defined and that there must be a real likelihood of violent reaction by the actual addressee comport with the need to guard carefully against broad exceptions to the constitutional protection of speech.

The previous discussion demonstrates that the fighting words doctrine has changed from a concept of a static class of words always unprotected by the first amendment to a concept that requires case-by-case determination based on a number of interrelated factors. In every fighting words case, the court must determine (1) that the speech at issue would tend to incite the average addressee to violence, (2) that the actual addressee was so incited, (3) that circumstances were such that a breach of the peace could have occurred, and (4) that the speech does not have a value that merits constitutional protection. The Ohio Supreme Court failed to consider these factors in reaching its decision in *State v. Phipps*.

III. Analysis of *Phipps*

A. *Vagueness*

In *Phipps*, the Ohio Supreme Court reversed the court of appeal's decision that Ohio Revised Code section 2907.07(B) is unconstitutionally vague and found the statute to be clearly and precisely written.[159] To support this finding, the court purported to demonstrate that each of the operative words of the statute is clearly defined in the Ohio Revised Code, *Webster's Third New International Dictionary*, or *Black's Law Dictionary*.

Despite this weighty authority, the court failed in its demonstration that the statute is not vague. As previously noted, vagueness in first amendment cases does not necessarily produce a lack of notice. It can produce too much notice, which results in a chilling of first amendment rights.[160] The court used the following definition of "offensive"—"that which is disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness," and that which "calls forth a determination to resist or rebel."[161] This definition gives too much notice

158. *Id.* One of the duties of the police is to keep the peace. Citizens have a right to expect them not to breach this duty in response to offensive language. Offensive language, regardless of its nature, should never be "likely" to cause a retaliatory breach of the peace when it is addressed to a police officer.

159. 58 Ohio St. 2d at 274, 389 N.E.2d at 1131.

160. For an explication of the vagueness doctrine, *see* text accompanying notes 47-59 *supra*.

161. 58 Ohio St. 2d at 274, 389 N.E.2d at 1131. The effect of this definition in terms of the statute's overbreadth will be dealt with in the next section.

because it proscribes speech that obviously cannot be prohibited under the Constitution and fails to specify what speech is prohibited.[162]

The United States Supreme Court has long recognized that speech which is merely disagreeable or even that "creates dissatisfaction . . . or even stirs people to anger"[163] cannot be constitutionally proscribed. Yet, the definition used by the Ohio Supreme Court in *Phipps* results in the prohibition of such speech. Simply because the meaning of "offensive" may be clear does not dispel the chilling effect of Ohio Revised Code section 2907.07(B). Anyone attempting to comply with the statute would have to avoid the use of protected speech.

In addition to being vague for giving too much notice, the statute is vague because it sets no standard of conduct. Even if the court's definition of "offensive" is accurate, the statute fails to set a guideline to determine when a person has become reckless in regard to offending the sensibilities of another.[164] Compliance with the statute as written would require that language used in establishing same-sex contacts be palatable to the most homophobic members of society. Such a rigid standard for the proscription of speech has been held unacceptable by the United States Supreme Court.[165]

Ohio's importuning statute is directed mainly at the proscription of speech.[166] Because there is no class of words that will always be fighting words, any statute directed at speech is unconstitutionally vague even if construed to apply only to fighting words. This is so because language must be determined to be fighting words on a case-by-case basis.[167] Because these factual determinations must be made case-by-case, a statute directed at speech could never overcome the problem of unconstitutional vagueness. Adequate notice of the speech proscribed could never be given.[168]

The only constitutionally permissible use of the fighting words doctrine is as a test for determining whether particular language violates a statute directed at conduct other than speech.[169] For instance, if the basis of a prosecution under a disorderly conduct statute is that language used

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162. L. TRIBE, *supra* note 30, § 12-28 at 719.

163. Terminiello v. Chicago, 337 U.S. 1 (1949).

164. In Coates v. Cincinnati, 402 U.S. 611 (1971), the Court held that a statute prohibiting conduct "annoying to others was vague because it failed to state upon whose sensitivity the determination of annoyance would depend. *Id.* at 613-14. The Court said that such a statute is vague because "no standard of conduct is specified at all." *Id.* at 614.

165. *See* Miller v. California, 413 U.S. 15 (1973); Mishkin v. New York, 383 U.S. 502 (1966); Butler v. Michigan, 352 U.S. 380 (1957).

166. State v. Phipps, 58 Ohio St. 2d at 276; 389 N.E.2d 1123. The court stated: "R.C. 2907.07(B), on its face . . . proscribes speech."

167. L. TRIBE, *supra* note 31, § 12-26 at 715.

168. *Id.* at 716.

169. By making the focus of the statute conduct rather than speech, case-by-case determinations are permissible even when constitutionally protected speech may be incidentally infringed. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

elicited a violent response on the part of the addressee, the defendant can be convicted only if his language meets this test for fighting words. Ohio's statute fails to meet these standards and so should have been found unconstitutionally vague.

B. *Overbreadth*

The Ohio Supreme Court correctly held that Ohio's importuning statute is unconstitutionally overbroad[170] because it prohibits speech protected by the first amendment.[171] In order to cure the statute's overbreadth, the court attempted to give it a narrow construction by making it applicable to fighting words only. The court failed in this attempt for two reasons: first, it defined the word "offensive" so that the statute still proscribed protected speech;[172] and second, it applied the fighting words doctrine in a manner that prohibits speech protected by the first amendment.[173]

C. *The Fighting Words Doctrine*

In attempting to narrow Ohio's importuning statute to apply only to fighting words, the court failed objectly. It relied on the definition of fighting words in *Chaplinsky* without incorporating any of the changes that have occurred during the intervening years.[174] In *Phipps*, the court applied the fighting words doctrine to offensive speech that harms only sensibilities, despite the United States Supreme Court's rejection of protection of sensibilities as a valid state interest under the fighting words doctrine. In addition, the court applied the behavioral assumption—that fighting words trigger a violent reaction on the part of the addressee—to speech that has not been shown to be likely to provoke a violent reaction.

The *Chaplinsky* definition of fighting words recognized two state interests in the proscription of such speech—an interest in preventing breaches of the peace, and an interest in protecting the sensibilities of the recipients of the offensive language.[175] The interest in the protection of sensibilities has been eliminated as an acceptable basis for the proscription of fighting words. The only interest noted in the *Chaplinsky* formulation that is viable today is the state's interest in preserving the peace.[176] The Ohio Supreme Court did use the state's interest in preserving the peace as one basis for its decision. It stated that same-sex solicitations are "as a

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170. 58 Ohio St. 2d at 278, 389 N.E.2d at 1133.

171. *Id.*

172. *See* text accompanying notes 159-63 *supra*. The overbreadth in the court's definition of "offensive" arises from the proscription of constitutionally protected speech. The vagueness arises from the definition's failure to draw lines between protected and unprotected offensive language.

173. *See* text accompanying notes 79-89 *supra*.

174. 58 Ohio St. 2d at 278, 389 N.E.2d 1133-34.

175. *See* text accompanying notes 69-78 and 112-16 *supra* for an explanation of the state's interests under the fighting words doctrine.

176. *See* text accompanying notes 145-58 *supra*.

matter of common knowledge, often likely to provoke violent reaction."[177]

The bulk of the court's discussion of fighting words, however, emphasizes the protection of sensibilities as the basis for upholding the statute. The court relied heavily on Justice Powell's dissent in *Rosenfeld*,[178] which argued for continued use of the sensibilities interest as part of the fighting words doctrine. Noting that Powell felt that "grossly offensive and emotionally disturbing" language should be prohibited as a public nuisance even if it did not constitute fighting words,[179] the court stated, "[s]imilarly, we feel that solicitations of the type proscribed by the statute are often 'grossly offensive and emotionally disturbing.' They are. . . likely to cause injury in . . . [an] emotional sense . . . the shock to one's sensibilities [may result] in injury to one's mind and spirit."[180]

The serious infringement of constitutional rights effected by the majority was recognized by Justice Sweeney in his dissent. Sweeney remarked that the majority was equating offensive language with fighting words and by doing so was dangerously narrowing first amendment freedoms.[181] By using the sensibilities interest as the basis for the statute, the court necessarily kept the statute overbroad. Under the majority's interpretation of the fighting words doctrine, constitutionally protected activity is prohibited.[182] This interpretation is in clear contradiction to the United States Supreme Court's decision in *Gooding*[183] and subsequent cases.[184]

The behavioral assumption underlying the fighting words doctrine applies only in situations in which personally abusive epithets are used in a face-to-face confrontation.[185] Ohio's same-sex solicitation statute was not drafted to cover that type of situation. It deals with solicitations—the asking or proposing of an activity—not with situations in which insults are being hurled. One sincerely interested in having a sexual encounter would not try to achieve that goal by addressing his prospective partner with personally abusive insults or epithets. This is clearly illustrated by the facts of the instant case. Phipps told the officer he solicited that he was "handsome" and "beautiful" and that "he really liked him."[186] These statements are not insults.

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177. 58 Ohio St. 2d at 278, 389 N.E.2d at 1134. The court also noted the Technical Committee's comment to § 2907.07(B) that the rationale for prohibiting homosexual solicitations included the consideration that "there is a risk that . . . [the solicitation] may provoke a violent response" *Id.* at 279, 389 N.E.2d at 1134 (quoting the Committee Comment).

178. 408 U.S. at 902.

179. *Id.* at 906.

180. 58 Ohio St. 2d at 279, 389 N.E.2d at 1134.

181. *Id.* at 281, 389 N.E.2d at 1135.

182. For a discussion of overbreadth, *see* text accompanying notes 56-62 *supra.*

183. 405 U.S. 518 (1972).

184. Karlan v. Cincinnati, 416 U.S. 924 (1974); Lewis v. New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

185. *See* text accompanying notes 75-89 *supra* for a discussion of the behavioral assumption underlying the fighting words doctrine.

186. Record at 10-11.

To make the behavioral assumption valid, *Gooding*, it will be recalled, added a requirement that there be a real possibility that the addressee will react violently.[187] The court in *Phipps* never addressed this issue. Phipps' remarks were made to a police officer working in the vice department.[188] As previously discussed,[189] it is questionable whether an officer on duty should ever be offended to the point of being likely to react with violence. But when, as in the present case, the officer was on vice duty and admittedly had heard the words used by Phipps before,[190] it is ridiculous to apply the fighting words rationale. As part of his job, the officer had put himself in a situation in which he was likely to hear such language. If under these circumstances the officer could be offended to the point of reacting violently by Phipps' words, the problem is with the officer and not with Phipps.

In applying the fighting words doctrine, speech can be prohibited only if it would have a tendency to cause an average person to react violently.[191] The court found in *Phipps* that, as a matter of common knowledge, homosexual solicitations meet the average person standard.[192] Available statistics, however, are to the contrary.

In 1949 Alfred Kinsey reported that fifty percent of the male population of the United States had experienced some form of homosexual activity in their lives.[193] This activity ranged from repeated and exclusive sexual conduct to erotic reactions to homosexual stimuli.[194] The corresponding figure for women is 28%.[195] Kinsey asked only women whether or not they approved homosexual conduct for others. The response indicated that 23% approved and 63% were undecided.[196] These figures indicate that 85% of the female population did not have specific predetermined notions that homosexual activity is per se "bad." This assertion, combined with the fact that one out of two men has had some form of homosexual experience,[197] indicates that the court's assertion that the "average person" would be offended to the point of violent reaction by a homosexual solicitation is wrong.

Kinsey's statistics refute the Ohio Supreme Court's bald assertion that the average person would react violently to a sexual solicitation from a person of the same sex. The statute requires either knowledge that the

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187. *See* text accompanying notes 153-56 *supra.*

188. Record at 9.

189. *See* text accompanying note 158 *supra.*

190. Record at 11-12.

191. *See* text accompanying notes 86-89, 100-07, and 146-50 *supra.*

192. 59 Ohio St. 2d at 278, 389 N.E.2d at 1134.

193. A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 650 (1948).

194. *Id.*

195. A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 148 (1974).

196. *Id.* at 501. No standard for determining who or what is the "average" person has been set, yet Kinsey's statistics clearly are persuasive, at least to the point of demonstrating what is not the average.

197. A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 650 (1948).

person solicited will be offended or recklessness in regard to the offense that a solicitation will cause. The Ohio Revised Code states that a person acts knowingly "when he is aware that his conduct will probably cause a certain result."[198] Under the Code, a person acts recklessly when "he perversely disregards a known risk that his conduct is likely to cause a certain result."[199] The Ohio Legislative Service Commission defines "likely" as "when there is merely good reason for expectation or belief."[200] Kinsey's statistics indicate that it is probable that a person solicited will not be offended to the point of violent response.

In reaching its decision in *Phipps*, the court failed to ascertain whether or not the addressee of Phipps' words was offended to the point of reacting violently. The court also neglected to determine whether an average person would have reacted with violence in the same situation. In addition, the court applied the fighting words doctrine to words far different from the abusive epithets commonly recognized as fighting words. In short, the court was trying to fit a round peg into a square hole.

Conclusion

The Ohio Supreme Court in its decision in *Phipps* relied on an outdated concept of the fighting words doctrine. It failed to recognize the narrowed application of that doctrine adopted by the United States Supreme Court in recent years.

The court in *Phipps* has carved out a substantial exception to first amendment protections in its attempt to prohibit speech it considers offensive. This poorly reasoned decision clearly demonstrates the court's prejudice against homosexual lifestyles.[201] The courts attempt to expand the fighting words doctrine to prohibit same-sex solicitations needs serious reconsideration.

Ohio Revised Code section 2907.07(B), as interpreted by the court in *Phipps*, prohibits constitutionally protected speech. This is in intolerable situation that demands immediate correction, if not by the court, then by the legislature. Both would do well to recall the nursery rhyme so often recited by quarreling children:

> Sticks and stones
> May break my bones
> But words will never hurt me.

S. Adele Shank

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198. OHIO REV. CODE ANN. § 2901.22(C) (Page 1975).

199. *Id.*

200. Legislative Serv. Comm'n Note to OHIO REV. CODE ANN. § 2901.22 (Page 1975).

201. *See* State v. Brown, 39 Ohio St. 2d 112, 113, 313 N.E.2d 847, 848 (1974), in which the court said that "the promotion of homosexuality as a valid lifestyle is contrary to the public policy of this state."